United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued By
PHILIP PELTZ

75-1236

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

Docket No. 75-1236

ROSAURA MUNOZ DE GARCIA,

Defendnat-Appellant.

----------X

Appeal From the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v- DOCKET NO. 75-1236

ROSAURA MUNOZ DE GARCIA,

Defendant-Appellant.

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BRIEF FOR APPELLANT

Statement of the Issues Presented for Review

1. Whether the trial court erred in denying the motion for a new trial based on discovery of evidence known to the government at the time of trial.

2. Whether the trial court erred in refusing to ask four questions requested by defense during the voir dir of the jury.

Statement of the Case

Defendant below, hereinafter referred to as appellant, appeals from a judgment of the United States District Court for the Eastern District of New York filed on June 20, 1975 convicting her of the crimes of knowingly and intentionally importing approximately 4,519 grams of cocaine into the United States in violation of Title 21, United States Code, §952(a) and knowingly and intentionally

possessing with intent to distribute approximately 4,519 grams of cocaine in violation of Title 21, United States Code, §841(a)(1). Appellant also appeals from a denial of a motion for a new trial based on the discovery by defense counsel of evidence which had been known to the prosecutor at the time of trial and which had been suppressed by the government.

Appellant was indicted on December 7, 1972 and charged in a three-count indictment of violation of 21 U.S.C. §960(a)(1), 952(a), 960(a)(2), 955 and 841(a)(1), which crimes consisted of knowingly and intentionally importing cocaine into the United States, knowingly and intentionally bringing and possessing cocaine on board an aircraft, the said cocaine not then being a part of the cargo entered in the manifest for, or part of the official supplies of, said aircraft, and knowingly and intentionally possessing with intent to distribute cocaine. Appellant entered a plea of not guilty to the indictment, and jury trial was had before Judge Bramwell, U.S.D.J., commencing on May 2, 1975. Prior to trial, a hearing was had on defendant's motion to suppress the evidence seized from appellant. Such motion was denied. Count Two of the indictment was dismissed on motion of the United States Attorney. The jury found the appellant guilty on the two remaining counts on May 8, 1975. On June 20, 1975 defendant was sentenced to imprisonment for a period of five (5) years plus a special parole term of five (5) years

on Count One, and was sentenced to imprisonment for a term of five (5) years plus a special parole term of five (5) years on Count Three, the sentences on Count One and Count Three to run concurrently. A notice of appeal from said judgment was filed on June 20, 1975. A motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure was duly brought on to be heard by defense counsel based on his discovery in the sentencing memorandum for appellant that certain evidence had been suppressed by the prosecution. On August 1, 1975 argument was had on the motion, and it was denied by Judge Bramwell. Appellant is presently serving her sentence in the custody of the United States Attorney.

Statement of the Facts

On November 16, 1972 Customs Agent Swinimer examined the luggage of Rosaura Munoz de Garcia at JFK International Airport. (Tr 58-60). He noticed the inner sides of the luggage were bulkier than he would normally expect in Samsonite luggage (Tr. 66). Upon removing the personal belongings from one side of one suitcase, he found that side heavy (Tr. 66). He summoned his supervisor and received permission to make an incision into the suitcase (Tr. 66). The incision revealed a white substance, suspected of being cocaine (Tr.66).

Appellant was arrested and later was questioned as to the source of the cocaine. Denying knowledge of the presence of the white substance, appellant told the agent how she came to possess the suitcases. She stated, at the time of arrest and at trial, that in October of 1972 a woman named Ana Agudelo came to her apartment in Queens. Ana Agudelo was looking for relatives who had lived in the building but had moved away. Appellant allowed this woman to stay in her apartment for two days because the woman claimed she knew no-one else in the City. When the woman left, she told Rosaura Munoz de Garcia to keep the suitcases for a short while, that she would return to pay for her room and board and to retrieve the suitcases. Ana Agudelo never returned. Mrs. Garcia decided to use the suitcases on a trip she was taking to Chile with her daughter in search of medical assistance for that daughter (Tr. 73-74, 100-101, 252-258). It was upon her return to the United States from Chile that she was arrested.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED ON DISCOVERY OF EVIDENCE KNOWN TO THE GOVERNMENT AT THE TIME OF TRIAL.

Evidence material and favorable to the defense of the charges herein was not disclosed to the defense by the prosecutor. The facts show that this evidence was deliberately suppressed by the government or that the government ignored evidence of such high value that it could not have escaped its attention. A new trial, therefore, must be granted. United States v. Rosner, 516 F.2d 269 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975); United States v. Kahn, 472 F.2d 272 (2d Cir. 1973), cert. denied, 411 U.S. 982 (1973). Even if the government's failure to disclose had been inadvertent, a new trial must be granted because the undisclosed evidence "developed by skilled counsel . . .could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, 411 F. 2d 825 (2d Cir. 1969). The cases in this Circuit which recite the tests set out above are legion. See cases cited in United States v. Seijo, supra at n. 9. A review of the facts of each case is not here necessary as this Court has stated that in applying these tests, the "cases must largely turn upon their own facts." (emphasis

supplied) United States v. Rosner, supra at n.8. The facts of this case show that under either test, the appellant is entitled to a new trial.

On the eve of trial, two and one- half years after the initial seizure of ten pounts of cocaine in the suitcases of Rosaura Munoz de Garcia, three previously undetected pounds of cocaine were discovered by the Customs agents (or by the prosecutor himself*). There was no disclosure of this discovery to defense counsel prior to or during trial. Defense counsel became aware of this evidence when reading the Probation Department's sentencing memorandum (See Appendix at 63a.)

Defense counsel duly moved the trial court for an order granting a new trial based on this discovery. The prosecutor, opposing, contended that he had, in fact, made full disclosure of the evidence, pointing to a statement made earlier at trial that:

> "One other thing I would like to call to your Honor's attention to is the fact that in one of the suitcases there very well may be some cocaine still there in one of the secret compartments of the suitcase. I just wanted to call it to the Court's attention." (Tr. 41, Appendix at 67a.)

This argument, so to speak, proves too much.

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*The record below is barren as to where, when, by whom and under what circumstances the additional three pounds were discovered.

The statement pointed to by the prosecutor indicates knowledge, assumes materiality and fails to disclose anything. The prosecutor, obviously aware of the presence of a white substance in the suitcases endeavored to protect himself from future discovery. What other reason for such an ambiguous pronouncement, apparently a propos of nothing then under discussion at the trial. There was however, no actual disclosure. There was no indication that the cocaine was additional to that alleged in the indictment, nor was there any indication of quantity or time of discovery. The statement was not an honest effort at disclosure, rather it was an attempt to protect from future charges of suppression.

One can evaluate the import of the alleged disclosure by the reaction of a neutral third party to whom the statement was addressed. The statement was addressed to the trial judge. Did he take it to mean that there was a significant amount of cocaine present in the suitcase? The record discloses that he absolutely did not.

There was no reaction to the statement at the time it was made (Tr. at 41 et. seq.). Had the Court the slightest inkling that three pounds of cocaine were in fact in the suitcases, would it have offered the suitcases to the jury during deliberations, or would it have insisted, as it had with regard to the ten original pounds, that the suitcases be removed from the courtroom? (Tr. 174). The record discloses that Judge Bramwell offered the suitcases to the

jury (Tr. 451). Furthermore, he suggested locking the suitcases in a closet in the courtroom overnight (Tr. 429-430); certainly this is not the type of security usually employed for three pounds of cocaine and not the type of security employed by this judge with regard to the rest of the cocaine. It is clear that a neutral party, one actually present at the time of the statement, was not made aware of the presence of three pounds of cocaine then in the suitcase.

The Case Agent's affidavit does not assist the government. Prior to trial, the suitcases were made available for inspection at the Customs offices by an expert employed by the defense and, frankly, he did not discover the cocaine. This expert was not employed to ferret out the cocaine, not even to analyze it -- but had he discovered it, there was absolutely no way he could have been aware that this cocaine was not part of that described in the indictment. The only persons who could have possibly known that this cocaine was in addition to that already discovered were the persons in sole custody of the suitcases and the cocaine -- the prosecution team. The failure to disclose the new evidence on the facts of this case lead to a conclusion of deliberate suppression. As was previously stated, the wording of the statement by the prosecutor indicates knowledge. The fact of the statement indicates that the prosecutor was aware of the importance of the discovery. The statement was,

however, not a disclosure.

Further insight into the posture now adopted by the prosecutor may be gleaned from another episode. While we seek to avoid pointing an accusing finger, the prosecutor at the time of jury selection, requested that defendant's framed question No. 6, "Do you have any basis, prejudice or preconceived ideas of any kind which would disable you from sitting fairly as a juror in this case where the defendant is charged with importation of ten pounds of cocaine?" be modified to omit the specified amount. The prosecutor stated "I think, at that time, if your Honor would not specify a figure it would be most wise." (Appendix at 14a). In retrospect this becomes not only quite relevant but also curiously revelant. Why this request? What arcane motive did he have? It seems clear that the prosecutor was even at this early stage of the proceedings aware of the additional cocaine in the suitcases. Instead of informing defense counsel and the Court at this time, when it was clearly on his mind, of the additional discovery, the prosecutor attempted only to prevent the court from specifying the amount of cocaine allegedly possessed by the defendant in his questions to the jury. It also appears, from a comment made at this time, "The government intends to prove during the trial how much contents there was," (Appendix at 14a) that the prosecutor may have at this time intended to disclose the additional discovery. This disclosure never occurred.

If this Court were to be convinced by some explanation of the facts discussed above that the evidence was not in fact deliberately suppressed and that the prosecution's failure to disclose was inadvertent, then the evidence must be measured against the test of whether "There is a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, supra at 832.

It is not easy to predict the affect of evidence on the minds of jurors, but judicial guidance is found in former analyses of this type. Where the new evidence "related to a witness's own misconduct, independent of the circumstance of this case, and not to any element of the substantive offenses" this Court refused to grant a new trial. United States v. Rosner, supra at 274. Discovery of cumulative impeachment ammunition does not require a new trial. United States v. Pfingst, 490 F. 2d 262 (2d Cir. 1973), cert. denied, 417 U.S. 919 (1974), however, failure to disclose hypnosis of a main witness does, United States v. Miller, supra, as does suppression of a governmental promise to a major witness. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 104 (1972). Although it is difficult to categorize the types of evidence which do result in this Court's decision to grant a new trial under this test, it

seems that evidence which will require a new trial is that which changes the complexion of a trial; i.e. that which adds a new dimension to the previously adduced evidence. The fact here suppressed does exactly that.

That this evidence would be labeled material and favorable to the defense might at first glance, seem absurd. An analysis of the evidence as adduced at the trial shows that this would have been of great assistance to the defense. The disclosure of three more pounds of cocaine per se would not have materially helped the defense at all. But the fact that so significant a quantity remained undetected in the luggage while in the sole custody and control of the government becomes quite material when viewed in the context of the entire trial.

The prosecution presented evidence of an efficient, competent team of alert and intelligent agents. The Customs official suspected, by the bulk and "weight" of the suitcases that something was amiss (Tr. 66). After discovery of the cocaine, the suitcases were transported to the offices of the Customs Department where, according to Agent Salute, the suitcases were searched thoroughly and the white powder was taken out (Tr. 87). It was then brought to a chemist, analyzed, the chain of custody established and the case presented to the jury as a neat package.

Possession was established, and was, in fact, never denied by the defense. The defense challenged only the

element of intent and offered an explanation for the possession. The jury was called upon to decide the question of knowledge and intent. Implicit in the guilty verdict was the finding by the jury that either the defendant had actual guilty knowledge or that she, in the words of the charge to the jury, "deliberately closed her eyes to what she had every reason to believe was fact." (Appendix at 40a).

Add one additional fact, that of the undiscovered three pounds of cocaine. The agents are suddenly stripped of their aura of competence. They are no longer quite as infallible as the jury believed. The testimony of the agent who based his suspicions on the "weight" of the suitcases becomes far less compelling. The agent who inspected the suitcases and removed the cocaine becomes far less efficient. The neat package presented to the jury has now been unwrapped and a few loose ends are hanging and dangling. The argument can be made that the agents, with their training in narcotics detection and self-proclaimed expertise could be charged, under the same circumstances, with "deliberately closing their eyes to what they had every reason to believe was fact."

This evidence is shown to be more than merely material to the defense, it supports the essence of the theory of defense. The additional fact could well have become the capstone of the defense. Cf. United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974), cert denied, 419 U.S. 826 (1974). Rosaura Munoz de Garcia

the agents at arrest the same account of the facts leading up to that arrest as she told the jury from the witness stand. She denied knowledge of the presence of the cocaine in the suitcases. She did not know how much the suitcases should weigh when completely empty. She carried these suitcases out of the country and back, without ever suspecting that something was amiss. This becomes much more believable when it is known that the agents, trained in narcotics detection, failed to find three pounds of cocaine secreted in the same suitcases for two and one-half years.

The suppression by the prosecutor is striking in view of trial strategy and use which could have been made by the defense becomes crystal clear. The prosecutor would not want this evidence to be presented to the jury so that his case would not be clouded with human error. Human error and human ignorance were the gravamen of the defense's strategy. Right in his opening, defense counsel signalled the fact of the excess weight of the suitcases and how this would have to be explained by the defense. The prosecutor, by admitting that trained agents could carry a standard suitcase, supposedly empty, without detection of three pounds of contraband, would have bolstered the credibility of the defense. Rather than risk this, at the expense of truth and fairness, the government apparently suppressed the evidence and tried to protect itself on the record by seemingly disclosing the find.

The result was to make it clear that the prosecutor did in fact know of the additional cocaine but he did not let the Court nor the defense know that it was significant quantities of additional cocaine.

On the argument of the motion for a new trial, the Court stated that this evidence would not have resulted in a different verdict because no one could be expected to know how much a suitcase weighed, citing an example from his personal experience (Appendix at 76a). The agent, however, claimed to have just that expertise. He emptied out the side of the suitcase and it was heavy. This testimony does not seem credible. In fact, one would assume that his training would be such to insure such knowledge. In deed, all of the agents should, to effectively perform their functions, have such knowledge. Three pounds of cocaine, however, remained undetected in one suitcase for two andone-half years. Defense counsel should have had the opportunity to explore the possibilities which this one additional fact provided. Action by the prosecutor prevented this and defendant is therefore entitled to a new trial.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ASK FOUR QUESTIONS REQUESTED BY THE DEFENSE DURING THE VOIR DIRE OF THE JURY.

The extent of questioning on the selection of the jury is within the sound discretion of the trial court. United States v. Grant, 494 F.2d 120 (2d Cir. 1974), cert. denied, 419 U.S. 849 (1974) and cases cited therein. No discretion is, however, unlimited and the trial court here deprived appellant of her right to make significant use of her peremptory challenges. The United States Constitution gives the accused the right to an impartial jury. U.S. Const. Amend. VI. Congress has provided the functional framework for the exercise of this right and has in fact expanded this right in Rule 24 wherein a defendant, in a non-capital case, is allowed ten peremptory challenges. Fed.Rules Cr. Proc., rule 24. To exercise these peremptory challenges, the defendant need not show that the prospective juror would not be impartial; the defendant can exercise these challenges for any reason or for no reason.

Although Rule 24 grants the trial judge great discretion in the acceptance or rejection of questions proferred by the defense, under the circumstances of this case, the trial court improperly refused to ask four questions suggested by defense

counsel.

The questions which the court refused to ask are as follows:

1. How much education do you have?
2. What schools did you attend?
3. Have you been in the armed forces? How long? Where?
4. Do you own or rent your home?

(Appendix at 3a).

The refusal of the court to ask the proferred questions seems to have been based on an assumption that the questions it did ask were sufficient to judge the background of the jurors. (Appendix at 13a-14a). It hesitated to "embarrass people by going into details of their background." (Appendix at 22a). No one choses to inflict embarrassment upon potential jurors, however the questions submitted by defense counsel were certainly not abusive or overbearing. The questions were designed to elicit background information deemed necessary to intelligently exercise the defendant's right to challenge jurors emptorally.

A defense attorney bases his questions on his experience and understanding of his client and the defense he will be presenting. It is respectfully submitted that defense counsel is not obligated to reveal to the court or to his adversary his reasons for submission of certain questions any more than to reveal the defense choice of jury profile. Where the questions presented by defense

counsel are not offensive or cumulative the defendant should be allowed the benefit of defense counsel's experience in selection of the jury. The statutory grant of peremptory challenges is an empty right unless sufficient information about the prospective juror is elicited. The Court asked the jurors questions concerning their employment, their spouse's employment, prior jury experience, connection with police officers, bias or prejudice with regard to the type of case and prejudice occasioned by the defendant's inability to speak English (Appendix at 18a-21a). The limited questioning failed to provide an adequate basis on which to intelligently exercise the defendant's peremptory challenges. The four additional questions proferred by defendant would have provided a broader knowledge of the persons who would sit in judgment of appellant. Deprivation of this opportunity by the trial court was an abuse of discretion.

CONCLUSION

Appellant should be granted a new trial based on the government's suppression of evidence material and favorable to the defense of the crimes charged. In the alternative, appellant should be granted a new trial based on the court's abuse of discretion in jury selection.

Respectfully submitted,

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